BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LLOYD LANHAM Claimant V. **BRADKEN, INC.** Respondent AND **TRAVELERS INDEMNITY CO. OF AMERICA** Insurance Carrier	)))))))))	Docket No. 1,072,104

ORDER

STATEMENT OF THE CASE

Claimant appealed the February 19, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Mark S. Gunnison of Overland Park, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 17, 2016, preliminary hearing and exhibits thereto; the transcript of the June 10, 2015, preliminary hearing; the October 9, 2015, independent medical evaluation report and records of Mark Bernhardt, M.D.; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he sustained a back injury by accident arising out of and in the course of his employment on February 7, 2014. He notes that prior to his work accident, his back was asymptomatic and although the accident aggravated his preexisting disc disease, the accident also caused a lumbar strain/sprain and a left-sided radial tear of the disc at L3-4, which is in addition to his diagnosis of degenerative changes. Claimant argues his work injury did not solely render his preexisting condition symptomatic.

Respondent asserts claimant failed to prove his accident was the prevailing factor causing his medical condition and need for medical treatment. Respondent contends

claimant had preexisting lumbar degenerative disc disease and claimant's need for medical treatment is the result of said degenerative disc disease and not his work injury.

The ALJ denied claimant's request for medical treatment, finding: (1) claimant's accident aggravated and made symptomatic his preexisting degenerative condition, (2) his accident was the prevailing factor causing his lumbar strain/sprain, (3) his current symptoms are unrelated to his compensable lumbar strain/sprain and (4) with regard to his lumbar strain/sprain, he has reached maximum medical improvement.

The sole issue is: did claimant's injuries arise out of and in the course of his employment?

FINDINGS OF FACT

The ALJ's Order sets out findings of fact that are detailed and accurate and it is not necessary to repeat those findings of fact herein. The undersigned Board Member adopts the ALJ's findings of fact as his own.

On May 2, 2014, Dr. Alexander Bailey examined claimant and noted he had a left-sided radial tear of the disc at L3-4. He stated, "The radial tear at L3-4 is contralateral to the patient's symptomatologies. Despite the onset of some symptomatologies by report from lifting a propane tank, I do not believe I can state within a reasonable degree of medical certainty that this is a work-related condition or injury."[1] Dr. Bailey essentially repeated that opinion in notes from his May 30, 2014, visit with claimant. On that date, the doctor assessed claimant with degenerative disc disease, low grade spondylolisthesis, significant facet disorder and varying degrees of spinal stenosis, primarily at L3-4 and L4-5.

The September 16, 2014, report of Dr. Edward J. Prostic, who evaluated claimant at his attorney's request, does not mention a left-sided radial tear of the disc at L3-4. Nor does an April 3, 2015, letter to claimant's attorney from Dr. Prostic. Dr. Mark Bernhardt, who performed a court-ordered independent medical evaluation, did not diagnose claimant with a left-sided radial tear of the disc at L3-4, but among other things, diagnosed claimant with lumbar degenerative disc and facet joint disease at multiple levels, most significantly at L3-4 and L4-5.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

[1] P.H. Trans. (Feb. 17, 2016), Resp. Ex. A.

right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[3]

K.S.A. 2013 Supp. 44-508(f), in part, states:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

The undersigned Board Member adopts the ALJ's analysis and conclusions of law as his own as if specifically set forth herein except as hereinafter noted. This Board Member finds claimant's accident was the prevailing factor causing his lumbar strain/sprain, but was not the prevailing factor causing his preexisting degenerative condition and current need for medical treatment. Claimant's injury is not compensable because it solely aggravated his preexisting degenerative condition.

Claimant points out that Dr. Bailey diagnosed a lumbar strain/sprain and a left-sided radial tear of the disc at L3-4, in addition to claimant's preexisting degenerative condition. Claimant argues these are new injuries caused by his accident. To this Board Member, it is clear that Dr. Bailey felt claimant's accident was not the prevailing factor for his preexisting degenerative condition, which included the radial tear. In the doctor's notes from the May 2, 2014, examination of claimant, he indicated claimant had the radial tear. In the very next sentence, Dr. Bailey indicated he could not state, within a reasonable

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[2] K.S.A. 2013 Supp. 44-501b(c).

[3] K.S.A. 2013 Supp. 44-508(h).

degree of medical certainty, that claimant had a work-related condition or injury. This Board Member believes the doctor opined claimant's radial tear was not work related. Drs. Bernhardt and Bailey concurred that any medical treatment would be for claimant's preexisting degenerative condition. Moreover, Dr. Bailey is the only physician who diagnosed claimant with a left-sided radial tear of the disc at L3-4.

Admittedly, this is a difficult result for claimant, whose preexisting degenerative condition was asymptomatic prior to his accident. One of the purposes of the 2011 amendments to the Kansas Workers Compensation Act was to preclude compensation to injured workers whose injuries solely aggravated a preexisting condition.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, the undersigned Board Member affirms the February 19, 2016, preliminary hearing Order entered by ALJ Belden.

IT IS SO ORDERED.

Dated this ____ day of April, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable William G. Belden, Administrative Law Judge

[4] K.S.A. 2014 Supp. 44-534a.

[5] K.S.A. 2014 Supp. 44-555c(j).